No. 79-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., *et al.*,

Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE BUNKER HILL COMPANY AS AMICUS CURIAE

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BRIEF OF THE BUNKER HILL COMPANY AS AMICUS CURIAE

The Bunker Hill Company respectfully tenders this brief as amicus curiae for consideration by the Court. Bunker Hill supports the position presented by the American Textile Manufacturers Institute, Inc., and the other petitioners, and urges the Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTEREST OF AMICUS CURIAE

The Bunker Hill Company operates a large primary lead and zinc smelting complex in Kellogg, Idaho, and is one of the Nation's leading producers of those metals. The Company is thereby subject to the full range of safety and health regulations promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651 *et seq.*

Bunker Hill accordingly has a direct interest in the outcome of this case in which the Court will consider OSHA's cotton dust standard and will rule for the first time on the provisions of the Act which state that OSHA's health standards must be "feasible." Quite apart from the general interest it has in such a ruling as a company regulated under the Act, Bunker Hill has an immediate interest by virtue of the fact that it is a party to two cases involving OSHA health standards: *ASARCO Inc.* v. *OSHA* (9th Cir. No. 78-1959, decision pending), and *United Steelworkers of America* v. *Marshall*, _____ F.2d _____ (D.C. Cir. No. 79-1048, August 15, 1980).

In the latter case, which we will refer to as "the *Lead* case," the court of appeals sustained an OSHA regulation imposing extremely costly medical removal provisions on primary lead smelters and other lead producing and consuming industries and requiring them to meet stringent limitations on in-plant airborne lead concentrations despite the fact that OSHA had made no estimate of the economic impact of these requirements and was unable to point to any technology that would enable primary lead smelters to meet the limitations imposed by the regulation. The Court will shortly receive one or more petitions requesting it to review the decision of the court of appeals on the grounds that it raises important issues bearing on the meaning of the terms "feasible" and "reasonably necessary" in the standard-setting provisions of the Act that are not raised in the *Cotton Dust* case. Hence, consideration of the *Lead* case is essential if the Court is to complete its effort to clarify OSHA's standard-setting powers which began with the *Benzene* case, *Industrial Union Dep't* v. *American Petroleum Institute*, 100 S.Ct. 2844 (1980), and is continuing with the *Cotton Dust* case.

However, a decision in *Cotton Dust* will likely be forthcoming before the Court has an opportunity to consider the *Lead* case, and this brief is therefore designed to make the Court aware of the interrelationship between the two cases so that any ruling in *Cotton Dust* stating what OSHA has to do to comply with the feasibility and reasonable necessity requirements of the Act will be drawn with the *Lead* case in mind.

ARGUMENT

The Rulings Of The D.C. Circuit In The *Cotton Dust* And *Lead* Cases Are At Odds With The Occupational Safety And Health Act Because They Have The Practical Effect Of Freeing OSHA From The Act's Requirement That Health Standards Must Be "Feasible" And "Reasonably Necessary."

In the *Benzene* case, the Court struck down OSHA's standard stating that "it is unreasonable to assume that Congress intended to give the Secretary [of Labor] the unprecedented power over American industry that would result from the Government's view of §§3(8) and 6(b)(5)" of the Occupational Safety and Health Act, 100 S.Ct. at 2865. The Court was referring in that case to the Government's view that OSHA did not have to find that a significant risk of harm to health existed before imposing a new health standard. The Government's view of OSHA's powers under those same sections of the Act where issues of feasibility and the relationship of costs to benefits are concerned is similarly much too expansive, and it is clear that OSHA, its reviewing courts and persons subject to its regulations need from the Court not only a definition of the term "feasible" as it appears in the Act but also precise guidelines as to what findings OSHA has to make in

order to support its conclusion that a given standard is feasible and reasonably necessary.

A. The Definition Of "Feasible" Adopted By The Court Of Appeals In *Cotton Dust* And *Lead* Affords OSHA Excessive Power Not Contemplated By Congress.

The court of appeals panel that heard *Cotton Dust* held that a standard is feasible even if it forces an indeterminate number of employers out of business, 617 F.2d at 655. In *Lead*, which was decided on a two-to-one vote, the panel majority held that a standard is feasible as long as it does not threaten "massive dislocation" to or "imperil" the affected industry (slip op., pp. 143-44). Hence, both decisions would permit OSHA to put a number of companies out of business provided the number fell short of massive dislocation and did not mean that the entire industry was imperiled. We submit that to interpret "feasible" to mean feasible for some but not for others, and to read the term as allowing OSHA to shut down any number of companies as long as the total number is not "massive," renders the term meaningless.

Bunker Hill urges the Court to hold that there is no basis for concluding that when Congress stated that standards must be "feasible" it meant feasible only for some, and that OSHA may only adopt a standard if the Agency is able to show that, with at most rare exception, the standard can be achieved by the companies subject to it.

B. The Decisions Of The Court Of Appeals In The *Cotton Dust* And *Lead* Cases Do Not Impose Sufficiently Strict Requirements On OSHA As To The Nature Of The Findings It Must Make To Support A Standard.

Much of industry's opposition to OSHA's new health standards stems from the fact that, as in the *Cotton Dust* and *Lead* cases, OSHA's standards are designed to protect workers from biological responses or subclinical effects that have not been shown to be harmful to health and OSHA has determined as a matter of policy, and without examining how the costs and benefits of that policy compare with alternative approaches, that these standards must be met through extremely costly engineering controls and work practices such as job rotation rather than by far less expensive devices such as respirators and medical surveillance. While we urge that OSHA's approach is improper in any event, the problem is compounded by the fact that OSHA has not only chosen to impose complex and costly technological and work practice requirements on industry, but pays mere lip-service to the requirement that it make findings, based on "substantial evidence," demonstrating that such requirements are feasible. As we will show below, the decisions of the court of appeals in the *Cotton Dust* and *Lead* cases are in error in failing to enforce the requirement that such findings be made.

1. OSHA Must Be Required To Show That Its Standards Are Economically Feasible.

The *Cotton Dust* and *Lead* decisions permit OSHA to determine that a standard is "feasible" based on the most cursory examination of its economic impact and without consideration of the cumulative economic impact

of other standards. Indeed, the panel majority's decision in the *Lead* case would permit OSHA to adopt a standard without making any estimate of the cost of complying with it.

Thus, although OSHA anticipated that it would take ten years for primary lead smelters to install the controls OSHA believed would reduce worker blood lead concentrations to what the Agency considered acceptable levels, and that it would take other segments of the lead industry as long as five years to do so, OSHA required the entire industry to institute at once a medical removal program whereby workers with blood lead levels deemed excessively high by the Agency are removed from the workplace and guaranteed full pay and seniority. Yet, OSHA at no time calculated the cost of such a program, and there is not a word in the panel majority's opinion responding to industry's objections to that omission.

Moreover, no estimate was made by OSHA of the cost of rebuilding plants to install the new technology OSHA believed would enable companies to meet the standard, though the standard contemplates that industry would have to install new processes and hence rebuild its plants to meet the standard (slip op., pp. 172-74).[1] That omission was condoned by the panel majority on the ground that "[OSHA's] need to force experimental technology and to leave the choice of means to industry makes such a goal [developing cost estimates] quixotic" (slip op., p. 166).

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[1] The panel majority's decision discusses at some length OSHA's estimates of the cost of a much less stringent standard that OSHA originally considered and then abandoned. The discussion sheds no light on the feasibility of the standard OSHA ultimately adopted which the panel majority concedes "greatly increases the number of employees affected . . . as well as the . . . economic and technological demands on industry" (slip op., pp. 46-47).

Ultimately, the panel majority employed the same survival test that the panel in *Cotton Dust* did and concluded that no showing had been made that the affected industries "could not afford these costs" (slip op., p. 166). Elsewhere, the decision of the panel majority suggests that OSHA's procedures and rules afford companies potential relief from standards that prove infeasible. These procedures and rules include variances, the opportunity to use respiratory protection to meet a standard where engineering controls prove infeasible, and the availability of preenforcement review to test feasibility in the courts — all of which, the panel majority concluded, "greatly ease OSHA's preliminary burden in proving feasibility" (slip op., p. 162).

Bunker Hill submits that the requirement of the Act that standards must be feasible and that OSHA's determinations must be based on substantial evidence lose their effect when economic feasibility is equated with mere survival, as the decisions in the *Cotton Dust* and *Lead* cases do, and when the requirements of an OSHA regulation are determined to be economically feasible in the absence of any estimate of their costs or any analysis of the impact of those and other environmental costs on the affected industry. Moreover, nothing in the statute suggests that Congress intended that OSHA would be free, as the panel majority in the *Lead* case suggests, to conclude that the requirements of a health regulation are feasible in the absence of evidence of their economic impact, and to leave more careful assessments of feasibility to some future enforcement or variance proceedings.

Indeed, what is urgently required from the Court is a ruling that in order to meet the feasibility and substantial evidence tests imposed by the statute, OSHA must produce financial projections demonstrating that the

requirements of the standard, when taken together with other regulatory demands on the affected industry, will not weaken its competitive position.

2. If Industry Is To Be Forced To Meet OSHA's Standards Through Engineering Controls, OSHA Must Be Required To Show That Such Controls Are Available.

OSHA's indifference to questions of economic feasibility is accompanied by an inclination to impose technological requirements without finding they can be met. Thus, in the *Lead* case, OSHA was unable to point to any technology that would enable primary lead smelters to meet its lead standard, and instead afforded the industry ten years in which to develop technology capable of meeting the standard.

The majority decision in the *Lead* case upheld this approach on the ground that "American industry is capable of reaching virtually any low air-lead level at which it aims," and that "newly conceived experimental technology for primary smelters, most notably a new hydrometallurgical method of recovering lead from galena concentrate," though only "developed on the laboratory scale," held "great promise" that the standard could be met within ten years (slip op., p. 174).

There is no basis in the Act or in common sense for the concept that a standard is technologically feasible as long as industry is given enough time to develop the technology and there is at least the prospect that by then new extraction processes — that have yet to prove workable much less economically competitive — may be developed. Moreover, the majority's interpretation of what is meant by technological feasibility is in conflict with other judicial interpretations of that term. Thus, in

Bunker Hill Co. v. *EPA*, 572 F.2d 1286 (9th Cir. 1977), the court overturned a regulation imposing on the Company emission limitations that EPA conceded could not be met with existing technology but might be met by employing a so-called sulfur burner. The court held that the record

> "merely establishes that [the] sulfur burner proposal might work. As we noted above, this is not enough. The record must establish that the required technology is feasible, not merely *possibly* feasible. Approval of EPA's standards on the basis of this record would seriously risk closing down a major smelting operation on the strength of a showing that does no more than demonstrate that the technology on which EPA relies is only 'theoretical or experimental' " (572 F.2d at 1301).

Decisions under Section 111 of the Clean Air Act, 42 U.S.C. §7411, which has to do with the establishment of performance standards for entirely new sources, place similar restraints on administrative guesswork. See *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (" '[i]n order to be considered "available" the technology may not be one which constitutes a purely theoretical or experimental means of preventing or controlling air pollution' "); *Essex Chemical Corp.* v. *Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974) (in order to be considered "available" technology, the system must be one "which has been shown to be reasonably reliable, reasonably efficient").

While the cited cases arose under the Clean Air Act, they involve the setting of standards limiting airborne concentrations of a pollutant just as the *Cotton Dust* and *Lead* cases do, and hence the statements of the

reviewing courts requiring EPA to base standards on demonstrated technology are directly in point. Bunker Hill would urge the Court to articulate a similar rule directing OSHA to base its standards on technology that has been demonstrated to be workable and economic.

3. The *Cotton Dust* And *Lead* Decisions Are In Error In Not Requiring OSHA To Weigh Costs And Benefits.

As we have pointed out above, OSHA has refused to analyze the relative costs and benefits of alternative approaches to meeting health goals. The *Cotton Dust* panel sustained OSHA's position, holding, for example, that OSHA's rejection of respirator protection as a means of protecting workers was proper since it was based on sound "policy considerations," 617 F.2d at 653. Likewise, the panel majority in the *Lead* case not only was undisturbed by OSHA's failure to ensure that the costs of the lead standard bore a reasonable relationship to its benefits, but held that OSHA's requirement that inplant airborne lead concentrations not exceed a specified level was "reasonably necessary" even though there was no evidence of "the actual incidence of significant health effects at the old and new [permissible air lead concentrations]" (slip op., p. 110).

Bunker Hill urges that Mr. Justice Powell was correct when he stated in his concurring opinion in the *Benzene* case that "the statute requires the Agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits" and that a standard cannot be considered "reasonably necessary" if the standard "calls for expenditures wholly disproportionate to the expected health and safety benefits," 100 S.Ct. at 2877. See also *Texas Independent*

Ginners Ass'n v. *Marshall*, _____ F.2d _____ (5th Cir. No 78-2663, November 14, 1980).

The requirement that relative costs and benefits be assessed is particularly urgent in the *Cotton Dust* and *Lead* cases where OSHA's standards were set at extremely low levels to protect workers from subclinical effects or biological responses where there is no clear evidence of significant risk. See *Cotton Dust*, 617 F.2d at 654-55; *Lead*, slip op. at 115 ("here . . . OSHA is acting to prevent, not overt early symptoms of a disease, but subclinical effects"); *id.* at 128 ("OSHA's case . . . ultimately rests on its theory of subclinical effects").

CONCLUSION

In the *Cotton Dust* and *Lead* cases, the court of appeals has for all practical purposes supported OSHA's view that the establishment of health standards is a discretionary act, and that the Agency is free to impose extremely stringent standards designed to protect workers from health effects not shown to be serious without determining how industry will meet the standards, what it will cost industry to do so or whether there are not more efficient and less expensive ways of ensuring the protection of worker health. Had Congress intended the Agency to have that freedom, it would not have included in the statute the requirement that standards be "feasible" and "reasonably necessary" and that OSHA's findings in support of a standard be based on "substantial

evidence." It is essential that the Court reinforce these limitations on OSHA's powers.

Respectfully submitted,

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